A

MALAYSIA LAND PROPERTIES SDN BHD

v.

TAN PENG FOO

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
ALIZATUL KHAIR OSMAN JCA
MAH WENG KWAI J
[CIVIL APPLICATION NO: W-04-483-10/2011]
C 10 AUGUST 2012

CONTRACT: *Contractual terms - Sale and purchase agreement ('S&P') - Delivery of vacant possession - Delay of - Claim for damages - Issuance of architect's certificate granting extension of time - Reasons* D *for extension of time stated in certificate - Validity of - Whether challenged - Whether appellant entitled to rely on certificate - Whether certificate was final, conclusive and binding on respondent - Whether court can intervene with terms and conditions in S&P - Whether respondent willingly accepted terms in S&P*

E

CONTRACT: *Sale and purchase of property - Sale and purchase agreement ('S&P') - Delivery of vacant possession - Delay of - Claim for damages - Issuance of architect's certificate granting extension of time - Reason for extension of time stated in certificate - Validity of - Whether* F *challenged - Whether appellant entitled to rely on certificate - Whether certificate was final, conclusive and binding on respondent - Whether court can intervene with terms and conditions in S&P - Whether respondent willingly accepted terms in S&P*

G On 30 July 2003, the respondent entered into a Sale and Purchase Agreement ('S&P') with the developer ('appellant'), to purchase an apartment ('the unit'). The appellant was to complete the construction of the unit and deliver vacant possession to the respondent within 36 months from the date of the S&P and in the event of delay in the delivery, the appellant agreed to pay H liquidated and ascertained damages ('LAD') calculated from a day to day basis at the rate of 10% per annum on the purchase price paid. However, the appellant only delivered vacant possession on 1 August 2008, which was after a delay of 732 days. The respondent claimed for the sum of RM29,991.95 as the LAD for I the delay in delivery of vacant possession. It was the appellant's

defence that they were entitled to an extension of time up to 29 August 2008 based on the architect's certificate ('certificate') which listed down the reasons for the extension of time. In consideration to the claim, the High Court rejected the certificate as being invalid on the ground that the reasons stated in the certificate could not be substantiated and thus, was not conclusive and final. Dissatisfied with the decision, the appellant appealed to this court. The respondent argued that the architect's report, which was issued about one year after the delivery of vacant possession, was an afterthought and no weight ought to be attached to it. The issue that arose for determination in this appeal was whether the appellant was entitled in law to rely on the certificate pursuant to cl. 30 of the S&P to the effect that the architect's decision to grant the extension of time to the appellant was final, conclusive and binding on the respondent.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Mah Weng Kwai J delivering the judgment of the court:

(1) The certificate was final, conclusive and binding on the respondent due to the fact, *inter alia*, that the S&P provided for extension of time to be granted by the architect in situations deemed appropriate by the architect. Further, it was obvious that the respondent did not request for particulars or documents from the appellant and/or the architect to show that there was no basis for the architect to issue the certificate. It would have been prudent on the respondent to have applied for further and better particulars and/or discovery of documents before the trial. (para 12)

(2) The court could not and was not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of, *inter alia*, fraud, misrepresentation or *mala fides*. It is trite that the court should not intervene to rewrite the terms and conditions of the S&P which was willingly accepted by the respondent when it entered into the agreement with the appellant. It was decided in *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* that: (i) it was for the parties who intend to be bound by mutual obligations to make a contract for themselves; (ii) it was outside the scope of judicial power to

A make one for them; and (iii) where a contract is couched in unambiguous language, the court must give effect to it (*Central Bank of India Ltd Amritsar v. The Hartford Fire Insurance Co Ltd;* refd*)*. (para 12)

B **(3)** Unless the respondent could demonstrate that the certificate issued was manifestly erroneous or was issued with *mala fides,* the certificate would have to be accepted by the court. However, the respondent did not challenge the validity of the certificate under the final, conclusive and binding effect of C cl. 30 of the S&P. (para 12)

(4) There was no provision in the S&P that required the appellant to issue the certificate before the delivery of vacant possession and further, it was stated by the architect in evidence that the D extension of time could only be made after the project had been completed as time was needed to ascertain the reasons for the delay in completing the project. As such, it could not be said that the certificate was issued as an afterthought after the delivery of vacant possession. (para 12)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Pada 30 Julai 2003, responden telah memasuki satu Perjanjian Jual Beli ('PJB') dengan pemaju ('perayu'), untuk membeli sebuah pangsapuri ('unit'). Perayu sepatutnya menyelesaikan pembinaan F unit itu dan memberi milikan kosong kepada responden dalam masa 36 bulan dari tarikh PJB dan jika lewat dalam penyerahan, perayu bersetuju untuk membayar ganti rugi jumlah tertentu ('LAD') yang dikira dari hari ke hari pada kadar 10% setahun atas harga belian yang dibayar. Walau bagaimanapun, perayu hanya menerima milikan G kosong pada 1 Ogos 2008, iaitu selepas kelewatan selama 732 hari. Responden menuntut bagi jumlah RM29,991.95 sebagai LAD bagi kelewatan memberi milikan kosong. Pembelaan perayu adalah bahawa mereka mempunyai hak untuk melanjutkan masa sehingga 29 Ogos 2008 berdasarkan sijil arkitek ('sijil') yang telah H membutirkan alasan-alasan bagi pelanjutan masa. Dalam mempertimbangkan tuntutan, Mahkamah Tinggi menolak sijil tersebut sebagai tidak sah kerana alasan-alasan yang dinyatakan di dalam sijil itu tidak boleh disahkan dan oleh itu, bukanlah muktamad dan terakhir. Tidak berpuas hati dengan keputusan itu, I perayu merayu ke mahkamah ini. Responden berhujah bahawa laporan arkitek yang dikeluarkan satu tahun selepas penyerahan

milikan kosong merupakan satu pemikiran kemudian dan tiada penekanan yang boleh diberi kepadanya. Isu yang dibangkitkan untuk pertimbangan di sini adalah sama ada perayu berhak di sisi undang-undang untuk bergantung atas sijil itu berdasarkan kl. 30 PJB sehingga memberi kesan bahawa keputusan arkitek untuk membenarkan pelanjutan masa kepada perayu adalah akhir, muktamad dan mengikat atas responden.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)
Oleh Mah Weng Kwai H menyampaikan penghakiman mahkamah:

(1) Sijil itu adalah akhir, muktamad dan mengikat responden berdasarkan fakta, antara lain, bahawa PJB memberi pelanjutan masa yang dibenarkan oleh arkitek dalam keadaan yang dijangka berpatutan oleh arkitek. Selanjutnya, adalah jelas bahawa responden tidak memohon maklumat atau dokumen-dokumen daripada perayu dan/atau arkitek untuk menunjukkan terdapat asas bagi arkitek mengeluarkan sijil tersebut. Adalah lebih berhemat atas responden untuk memohon bagi butir-butir lanjut dan jelas daripada perayu dan/atau penzahiran dokumen-dokumen sebelum perbicaraan.

(2) Mahkamah tidak boleh dan tidak berhak untuk menyoal kesahihan sijil tersebut dalam ketiadaan keterangan untuk memberi pandangan bahawa sijil itu dikeluarkan atas sebab fraud, salah nyata atau *mala fide*. Adalah mantap bahawa mahkamah tidak boleh campur tangan untuk menulis semula terma-terma dan syarat-syarat PJB yang telah diterima secara rela oleh responden apabila memasuki perjanjian itu dengan perayu. Ianya diputuskan dalam *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* bahawa: (i) adalah bagi pihak-pihak yang berniat untuk terikat oleh obligasi bersama untuk memasuki kontrak bagi diri mereka sendiri; (ii) ianya adalah di luar skop kuasa kehakiman untuk membuat sebegitu untuk mereka; dan (iii) di mana sesuatu kontrak diselaraskan dalam bahasa jelas, mahkamah mesti memberi kesan kepadanya (*Central Bank of India Ltd Amritsar v. The Hartford Fire Insurance Co Ltd;* dirujuk*)*.

(3) Sehingga responden boleh menunjukkan bahawa sijil yang dikeluarkan itu mempunyai kesalahan atau dikeluarkan dengan *mala fide*, sijil tersebut masih akan diterima oleh mahkamah. Walau bagaimanapun, responden tidak mencabar kesahihan sijil tersebut dari segi kesan muktamad, akhir dan mengikat di bawah kl. 30 PJB.

(4) Tiada peruntukan di dalam PJB yang memerlukan perayu mengeluarkan sijil tersebut sebelum penyerahan milikan kosong dan juga, ia dinyatakan oleh arkitek dalam keterangan bahawa pelanjutan masa hanya boleh dibuat selepas projek tersebut diselesaikan memandangkan masa diperlukan untuk mengenalpasti sebab-sebab kelewatan dalam menyelesaikan projek tersebut. Oleh itu, ia tidak boleh dinyatakan bahawa sijil yang dikeluarkan itu adalah pemikiran kemudian selepas penyerahan milikan kosong.

Case(s) referred to:

Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA ***(dist)***

Bangkok Bank Ltd v. Cheng Lip Kwong [1989] 1 LNS 134 HC ***(refd)***

Bank of Tokyo - Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors [2001] 2 CLJ 474 HC ***(refd)***

Central Bank of India Ltd Amritsar v. Hartford Fire Insurance Co Ltd AIR 1965 SC 1288 ***(refd)***

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***

Getaran Unggul Sdn Bhd v. Syed Ahamed Mohamed Ghani & Anor [2004] 1 LNS 436 HC ***(dist)***

Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd [2007] 1 LNS 54 HC ***(dist)***

Golden Bay Realty Pte Ltd v. Orchard Twelve Investments Pte Ltd [1990] 1 CLJ 353; [1990] 3 CLJ (Rep) 499 CA ***(refd)***

Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd [2004] 1 LNS 537 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the appellant - Andrew Davis; M/s Andrew Davis & Co
For the respondent - Dhyana Shila; M/s Wilfred Dhyan & Co

[Appeal from High Court, Kuala Lumpur; Summons No: R2-12-25-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Mah Weng Kwai J:

Brief Facts

[1] On 30 July 2003, the respondent entered into a Sale and Purchase Agreement with the appellant, a developer, to purchase an apartment (the unit) at the price of RM149,550.

[2] The appellant was to complete the construction of the unit and deliver vacant possession to the respondent within 36 months from the date of the Sale and Purchase Agreement that is, by 30 July 2006.

[3] In the event of delay in the delivery of vacant possession the appellant agreed to pay liquidated and ascertained damages calculated from day to day at the rate of 10% per annum on the purchase price paid.

[4] The appellant delivered vacant possession on 1 August 2008, that is, after a delay of 732 days. Dewan Bandaraya Kuala Lumpur issued the "Perakuan Menduduki" on 26 August 2009.

The Claim

[5] The respondent claimed for the sum of RM29,991.95 as the liquidated and ascertained damages for the delay of 732 days in the delivery of vacant possession.

The Defence

[6] The appellant denied liability for the late delivery of the unit on the strength of its Architect's Certificate dated 12 September 2008 (exh. D9) (the certificate) confirming that the appellant was entitled to an extension of time up to 29 August 2008.

Decision of the Court

[7] Upon a reading of the Rekod Rayuan, the written submissions of counsel for the appellant and respondent and upon hearing the oral submissions of counsel aforesaid, the court was unanimous in its decision to allow the appeal with costs.

Grounds of Decision

[8] The only issue to be decided in this appeal was whether the appellant was entitled in law to rely on the certificate pursuant to cl. 30 of the Sale and Purchase Agreement to the effect that the architect's decision to grant the extension of time to the appellant was final and conclusive and binding on the respondent.

[9] Clause 30 of the Sale and Purchase Agreement provides:

> Notwithstanding anything to the contrary herein contained the vendor shall not be liable for any loss or damage to the Purchaser for any failure to fulfill any of terms of this Agreement if such fulfillment is delayed, hindered or prevented by *force majeure* including but not limited to the Appropriate Authorities' delay in its approval, permits or licence or any other government or statutory bodies' delay not within the Vendor's control or to any delays caused by the contractor(s) involved in the construction or development of the Integrated Development, Acts of God, strikes, lockouts, riots, civil commotion, general chaos, inclement weather, land slides/slips or any other circumstances of whatsoever nature beyond the control of the Vendor or by any reasons of the Purchaser requiring alterations or additions to the Parcel. *All decisions of the Vendor's Architect as to the reasons for any delay or any confirmation or statements by the Vendor's Architect of the introduction or amendment of the relevant laws, by-laws, rules or regulations resulting in the new or extra charges payable by the Purchaser shall be final and conclusive and binding upon the Purchaser.* (emphasis added).

[10] The appellant's architect when issuing the certificate referred to cl. 30 before setting out his reasons for granting the extension of time. It will be useful to set out in full the contents of the certificate at this juncture. The certificate reads:

> Our Ref : AJS 2-103/WW/MLP/L-33
> Date : 12th September 2008
>
> MALAYSIA LAND PROPERTIES SDN BHD
> No. 7, 31st Floor Menara May,
> Jalan Munshi Abdullah
> 50100 Kuala Lumpur
>
> Attn: Mr. Ho Chee Leong

Dear Sir,

CADANGAN PEMBANGUNAN YANG MENGANDUNGI:
BLOK B
(1) 21 TINGKAT SERVIS APARTMENT (445 UNIT)
DI ATAS SEBAHAGIAN LOT 48626, PLAZA DAMAS, JALAN HARTAMAS, MUKIM BATU, KUALA LUMPUR UNTUK TETUAN

MALAYSIA LAND PROPERTIES SDN BHD

Extension of Time

Referring to the above, your request for Extension of Time and all the information available to us, we would like to inform that the Developer is entitled for Extension of Time up to 29th August 2008.

In accordance to Clause 30 of the Sale and Purchase Agreement, the reasons for Extension of Time are mainly due to:

a. ... delays caused by the Contractor(s) involved in the construction ...

b. ... Act of God ...

c. ... inclement weather ...

d. ... shortage of materials ...

e. Any other circumstances of whatsoever nature beyond the control of the Vendor ...

Thank You.

Yours faithfully,
AJS ARCHITECT

Sgd

ALAN J.S.SU
Architect

[11] Counsel for the respondent contended that none of the four reasons set out in the certificate could be relied on by the appellant as they are not reasons, save for inclement weather, contemplated under the *force majeure* (cl. 30) provision. Importantly, counsel submitted that in any event the appellant had failed to produce documentary evidence necessary to support any of the reasons set out by the architect.

[12] The court is of the view that the certificate is final and conclusive and binding on the respondent for the following reasons:

(a) to begin with, cl. 22.1 of the Sale and Purchase Agreement envisaged and provided for extension of time to be granted by the architect in situations deemed appropriate by the architect;

(b) notwithstanding that time shall be the essence of the Sale and Purchase Agreement (cl. 8), cl. 22.1 clearly gave the power to grant extension of time to the architect for good reason;

(c) the *force majeure* clause (cl. 30) is not limited to the general notion of delay caused by "act of God, strikes, lockouts, riots, civil commotion, general chaos and inclement weather" only. The words *force majeure* have been held in many cases to have a more extensive meaning than "act of God" or "*vis major*". While the concept of *force majeure* does not encompass conditions of business or economic climate leading to a depressed economy, it would include dislocation of business by various actions and events. (See *Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] 1 LNS 54);

(d) counsel for the respondent cited the following cases to stress the point that the reasons given by the architect of (a) delays caused by the contractor(s) involved in the construction and (d) shortage of materials cannot come within the ambit of cl. 30:

(i) *Golden Bay Realty Pte Ltd v. Orchard Twelve Investments Pte Ltd* [1990] 1 CLJ 353; [1990] 3 CLJ (Rep) 499 where the Court of Appeal of Singapore held that the *force majeure* clause does not come into play where the delays caused were within the contemplation of the appellant and were within their control. In this case the court held that a vendor is not entitled to claim protection under the *force majeure* clause if he "had in fact under provided the time required to do the necessary things" nor would the expression "any other cause or causes over which the vendor has no control" be wide enough to excuse the appellant for the delays of their consultants;

(ii) *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135 where the Court of Appeal held that the delay to deliver vacant possession was not a delay as stipulated by the exclusion clause, ie, cl. 22 of the Sale and Purchase Agreement. The delay was by the appellant's sub-contractors who were under the control of the appellant.

For ease of reference, cl. 22 of the Sale and Purchase Agreement is reproduced here:

> ... Vendor shall not be liable to the purchaser for any failure on its part to fulfil any term herein if such fulfillment is delayed, hindered or prevented by circumstances beyond the Vendor's control including ... delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said Land and other circumstances of whatever nature beyond the Vendor's control and

(iii) *Getaran Unggul Sdn Bhd v. Syed Ahamed Mohamed Ghani & Anor* [2004] 1 LNS 436 where the High Court held that the stop-work order issued by Majlis Perbandaran Pulau Pinang did not fall within the *force majeure* clause;

But it will be noted however, that in none of the above cited cases, was there a clause equivalent to cl. 30 which provided that the certificate was final, conclusive and binding on the respondent;

(e) in his submission counsel for the respondent also contended that the appellant had failed to produce documentary evidence to support or justify the reasons stated by the architect in the certificate. This contention, as accepted by the learned judge, is not quite correct as the architect had in his letter dated 16 July 2009 to the appellant (rekod rayuan p. 175) attached a summary stating the reasons for the grant of extension of time to the appellant (see rekod rayuan pp. 176 to 187). The architect had also stated in his letter that "the information could be made available to any particular purchaser who request for it". It is obvious that in this case, the respondent did not request for particulars or documents from the appellant and/or the architect to show that there was no basis for the architect to issue the certificate. In the face of the certificate

and the conclusive and binding nature of cl. 30 it would have been prudent, indeed incumbent, on the respondent to apply for further and better particulars and/or discovery of documents before the trial. Unfortunately, the respondent did not do so. This is certainly not a case where the court ought to have invoked an adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 for having failed to produce documents in court;

(f) as mentioned earlier, a perusal of the cases cited by counsel for the respondent will immediately show that the agreements under consideration by the court in those cases did not contain a "final and conclusive and binding clause" as is applicable in the present case. Quite apart from including the *force majeure* clause in the agreements there was no other provision for the architect or other person on behalf of the vendor/developer, to seek exclusion from liability on the strength of a certificate issued by the architect or a similar person;

(g) the court is of the view that in light of the certificate, it is deemed conclusive that the reasons for the delay in the completion and delivery of vacant possession of the unit are as stated in the certificate. The court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of *inter alia*, fraud, misrepresentation or *mala fides*. It is trite that the court should not intervene to rewrite the terms and conditions of the Sale and Purchase Agreement willingly accepted by the respondent when it entered into the agreement with the appellant;

(h) in the case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said it is for the parties who intend to be bound by mutual obligations to make a contract for themselves. It is outside the scope of judicial power to make one for them and where a contract is couched in unambiguous language, the court must give effect to it. The court must give effect to the plain meaning of the words, no matter how distasteful the result may be (see the *Central Bank of India Ltd Amritsar v. Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288);

(i) on the use of "conclusive evidence clauses" in business and commercial agreements, it was held by Yong Pung How J (as he then was) in the Singapore High Court case of *Bangkok Bank Ltd v. Cheng Lip Kwong* [1989] 1 LNS 134 that where parties agree that a designated person will have power to issue a certificate as evidence of a fact, the issuance by him of the certificate is then conclusive evidence of that fact, as between the parties. The learned judge went on to say that, in the absence of fraud or obvious error on the face of it, a certificate issued under a "conclusive evidence clause" is conclusive of both the liability and the amount of debt". The *Bangkok Bank Ltd* case was later applied by Ramli Ali JC (now JCA) in *Bank of Tokyo - Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474;

(j) in the present case, the learned High Court judge fell into error when she rejected the certificate as being invalid on the ground that the reasons stated in the certificate could not be substantiated and thus not conclusive and final;

(k) while the court is mindful that a party relying on a *force majeure* clause must prove the facts bringing the case within the clause (see *Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd* [2004] 1 LNS 537), the court is of the view that in the present case the facts relied on by the architect are as contained in his report summary. It is because of the existence of the final and conclusive and binding clause that the court is constrained from determining the reasons proferred by the architect in detail. Suffice to say that unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with *mala fides*, the certificate will have to be accepted by the court;

(l) on this point, the court notes that the respondent apart from pleading in his reply and submitting that there were no events that could come within the *force majeure* clause, did not challenge the validity of the certificate under the final, conclusive and binding effect of cl. 30;

(m) counsel for the respondent contended that as the architect's report was issued on 16 July 2009; that is, about one year after the delivery of vacant possession on 1 August 2008, the report was an afterthought and no weight ought to be

attached to it. The court is of the view that this argument is without merit as there is no provision in the Sale and Purchase Agreement that requires the appellant to issue the certificate for extension of time before the delivery of vacant possession and further it was stated by the architect (DW2) in evidence that the extension of time could only be made after the project had been completed as time was needed to ascertain the reasons for the delay of the completion of the project. As such it could not be said to have been issued as an "afterthought" after the delivery of vacant possession;

(n) the court is also of the view that there is no ground for the respondent to impugn the certificate on the basis that it is only in the form of a letter from the architect. There is no provision in the Sale and Purchase Agreement or under the law for the certificate issued to be in compliance with a certain standard format. In the absence of any such specific requirement the court sees no reason why it should not accept the architect's letter dated 12 September 2008 as a valid certificate.

[13] In the result, the appeal was allowed with costs and the decision of the High Court set aside.